


2010

The International Criminal Court and the Closure of the Time-Limited International and Hybrid Criminal Tribunals

Valerie Oosterveld

Follow this and additional works at: <https://ir.lib.uwo.ca/lawpub>

 Part of the [Civil Procedure Commons](#), [Criminal Law Commons](#), [International Law Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

Citation of this paper:

Valerie Oosterveld The International Criminal Court and the Closure of the Time-Limited International and Hybrid Criminal Tribunals, 8 Loy. U. Chi. Int'l L. Rev. 13 (2010). Available at: <https://lawcommons.luc.edu/lucilr/vol8/iss1/3>

THE INTERNATIONAL CRIMINAL COURT AND THE CLOSURE OF THE TIME-LIMITED INTERNATIONAL AND HYBRID CRIMINAL TRIBUNALS

Valerie Oosterveld*

I. Introduction

The International Criminal Court (ICC) and the international and hybrid criminal tribunals – such as the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR) and the Special Court for Sierra Leone (SCSL) – are all part of an interlinked network of international criminal justice. One significant difference between the ICC and these other tribunals is that the ICC is a permanent institution while the ICTY, ICTR and SCSL are time-limited. The SCSL will be the first of these tribunals to close. It is currently hearing its final trial, that of the former President of Liberia, Charles Taylor.¹ The SCSL will wind up its operations after the conclusion of the Taylor trial and any associated appeal, likely in late 2011 or early 2012.² Under the latest estimates, the ICTY and ICTR expect to complete their work in 2014.³ Two tribunals – the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon – are also time-limited. Both originally estimated that proceedings would cease after approximately three years, putting their potential closure dates in 2012, but these dates will likely be extended.⁴

* Assistant Professor, Faculty of Law, University of Western Ontario (Canada). The author was involved in co-hosting, with the International Center for Transitional Justice and the Permanent Mission of Canada to the United Nations, two expert group meetings in New York on the closure of the international and hybrid criminal tribunals: “Planning for Residual Issues for International and Hybrid Criminal Tribunals,” February 26-27, 2007; and “Closing the International and Hybrid Criminal Tribunals: Mechanisms to Address Residual Issues” on February 4-5, 2010. The meetings were funded by the Government of Canada’s Human Security Program (2007) and Global Peace and Security Fund (2010).

¹ Prosecutor v. Charles Taylor, Case No. SCSL-2003-01-T, (May 4, 2009), <http://www.sc-sl.org/LinkClick.aspx?fileticket=GT0Wz4egOV0%3D&tabid=160>.

² U.C. BERKELEY WAR CRIMES STUDIES CENTER, THE OPEN SOCIETY JUSTICE INITIATIVE, CHARLES TAYLOR MONTHLY TRIAL REPORT: MAY 2010 (Jun. 30, 2010), <http://www.charlestaylortrial.org/2010/06/30/monthly-report-may-2010/> (The prosecution phase of the trial is completed and it is estimated that the defense phase of the trial will be completed in October 2010, with a judgment expected in early-to-mid-2011. Judgment on any appeal would follow within approximately six months, bringing the likely closing date for the Special Court for Sierra Leone to late 2011 or early 2012).

³ Letter from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 to the President of the Security Council (June 1, 2010), U.N. Doc. S/2010/207, Enclosures VIII-IX [hereinafter ICTY Letter] (Current estimates in the ICTY’s *Karadzic* case indicate an end-date for that case of June 2014; while there is an estimated end-date for the ICTR’s *Karemera et al.* case of December 2013, note that closure would not happen immediately after the end of the case).

⁴ EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA FREQUENTLY ASKED QUESTIONS, http://www.eccc.gov.kh/english/faq.view.aspx?doc_id=48 (last visited June 30, 2010) (This potential for a date extension is indicated on the website of the court); Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, S.C. Res. 1757, art. 21, U.N. Doc. S/Res/1757 (May 30, 2007) (“[T]he Agreement shall remain in force for three years from the date

The International Criminal Court

The establishment of temporary international criminal tribunals has given rise to complex legal, technical, and political questions regarding the legal and practical obligations that continue after closure. These obligations are usually referred to as “residual issues” or “residual functions.” This article will begin by discussing four central residual functions. The first residual function relates to the trials of fugitives. The ICTY, ICTR and SCSL have indicted individuals who have not yet been captured. The international community is currently planning for what will happen to both high-level and lower-level fugitives caught after the physical closure of these tribunals. The second residual function is the protection of victims and witnesses. There are a large number of individuals who are under the protection of the ICTY, ICTR and SCSL as a result of their assistance to and testimony before these tribunals. This protection cannot simply end because the tribunals close their doors, as this would greatly undermine the progress made in securing the cooperation of victims and witnesses and eliminating impunity. In addition, it is not hard to imagine that victims and witnesses would stop cooperating with the ICC if those appearing before other tribunals were harassed, injured or killed following the closure of the ICTY, ICTR and SCSL. The third residual function is the supervision of enforcement of sentences. Each of the tribunals has sentenced many individuals to lengthy prison terms, and these tribunals have a continuing responsibility to ensure that these sentences are carried out in accordance with international standards. The fourth residual issue is one of the most hotly debated: the preservation, protection, and provision of controlled access to, the tribunal archives. Current debates address how to best provide access to tribunal archives to affected communities, including consideration of where to locate the tribunal archives.

After discussion of the residual issues facing the time-limited tribunals, this article will address the residual issues which are also of concern to the ICC. While the ICC is a permanent institution and therefore does not face the same residual issues as the ICTY, ICTR and SCSL, it will, at some point, end its involvement in each of its situation countries and cases. As it does so, the ICC will face some of the same residual issues as the time-limited tribunals. For example, the ICC will need to address how it will continue to provide victim and witness protection once it closes its field office(s) in the situation country. The ICC will also need to consider how to provide continued access to public archival information to the affected populations, without necessarily assuming that they have internet access or can travel to the ICC’s headquarters in The Hague, Netherlands.

This article concludes that the ICC’s planning for its own residual issues can be assisted by considering the lessons learned from similar planning for the ICTY, ICTR and SCSL. Specifically, the ICC may benefit by keeping a field presence in or near the affected communities in the years following the completion of its investigations and cases in a situation country. This field presence can continue witness protection work and provide access to public archival informa-

of commencement of functioning of the Tribunal and that the Parties will, in consultation with the Security Council, review the progress of the work of the Tribunal.”).

tion. In so doing, the ICC can also help to protect its legacy. Proper “completion” planning by the ICC for its situation countries and cases is important: just as for the ICTY, ICTR and SCSL, if the ICC simply terminates operations and walks away from a situation country, the positive effects of its work could be undermined and future cooperation by witnesses and others with the Court (including in other situations countries) could be jeopardized.

II. Residual Issues Facing the ICTY, ICTR and SCSL

Due to their judicial nature, the ICTY, ICTR and SCSL cannot simply cease operations once their current trial and appeals activities are completed. The tribunals have continuing legal and practical obligations that must be addressed at the point of closure and for years into the future. The four main residual issues are explored in this section: trial for indicted fugitives, ongoing protection for victims and witnesses, supervision of enforcement of sentences and management of archives. In addition, other residual functions are briefly mentioned, including review of judgments and assistance to national authorities.

A. Trials for Fugitives and Referral of Cases to National Jurisdictions

What should be done with those individuals who have been indicted by the time-limited tribunals but who still remain at large at the time of the closure of the ICTY, ICTR and SCSL? The Security Council and the tribunals have clearly articulated their common position: there can be no impunity for fugitives.⁵ The Council has indicated that high-level fugitives will be tried at the international level, if caught.⁶ These high-ranking accused are, for the ICTY, Ratko Mladić and Goran Hadžić, and for the ICTR, Augustin Bizimana, Félicien Kabuga and Protais Mpiranya.⁷ The cases of lower-level accused are to be referred to domestic jurisdictions.⁸ The Special Court for Sierra Leone has one indictee who has not yet been brought to justice, Johnny Paul Koroma. Koroma is suspected to have died in Liberia in 2003, but his indictment remains open absent proof of his

⁵ The Secretary-General, Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism(s) for the Tribunals, para. 74, U.N. Doc. S/2009/258 (May 21, 2009) [hereinafter The Secretary-General Report] (on the views of the Security Council’s Informal Working Group on International Tribunals); ICTY Letter, *supra* note 3, para. 88 (on the views of the ICTY); Letter from the President of the International Criminal Tribunal for Rwanda to the President of the Security Council (May 28, 2010), U.N. Doc. S/2009/687, para. 15 [hereinafter ICTR Letter] (on the views of the ICTR); SPECIAL COURT FOR SIERRA LEONE, SIXTH ANNUAL REPORT OF THE PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE: JUNE 2008-MAY 2009 51 (2009) [hereinafter SCSL REPORT] (on the views of the SCSL).

⁶ Letter from the Chargé d’affaires a.i. of the Permanent Mission of Austria to the President of the Security Council, para. 15, U.N. Doc. S/2009/687 (Dec. 31, 2009) [hereinafter Chargé d’affaires].

⁷ The Secretary-General Report, *supra* note 5, para. 18; ICTR Letter, *supra* note 5, paras. 23, 24 and Annexes 2 and 3 (note that The Secretary-General Report refers to four high-level accused among 13 ICTR fugitives. Since the report was issued, two fugitives were caught and transferred to the ICTR, reducing the number of fugitives to 11. One of these fugitives was high-level accused Idelphonse Nizeyimana).

⁸ Chargé d’affaires, *supra* note 6, para. 15.

death.⁹ In May 2008, the Special Court's judges amended the SCSL Rules of Procedure and Evidence to allow the Koroma case to be referred for trial in another jurisdiction.¹⁰ The SCSL is currently considering its transfer to a competent national jurisdiction.¹¹

In order to be able to hold fugitives accountable, the tribunals' residual mechanisms will need to continually track fugitives and seek cooperation from states and organizations for their arrest and transfer. If a fugitive is captured, the relevant residual mechanism must be able to quickly transform into a functioning criminal tribunal. Specifically, the tribunal must be able to try a high-level accused, or in the case of a lower-level accused, refer the case to a ready and willing domestic jurisdiction, in a state in the territory of which the crimes were committed or in which the accused was arrested or which has jurisdiction and is willing and adequately prepared to accept the case.¹² If the latter course is taken, the residual mechanism must also be able to monitor the referred case to ensure that it meets international standards.¹³ The latter option mainly affects the ICTR, which currently has eight lower-level fugitives.¹⁴ However, it is not clear if this is a realistic option. To date, the Prosecutor of the ICTR has attempted to refer lower-level cases to domestic jurisdictions, especially Rwanda, but has not been successful.¹⁵ The Prosecutor has also indicated that he intends to continue to seek the referral of fugitives not deemed necessary to try at the international level but has "indicated difficulties in finding States willing and adequately prepared to accept these cases."¹⁶ This residual function could persist for decades, depending on the lifespan of the fugitives and how long they remain at large.

B. Protection of Victims and Witnesses and Contempt Trials

One of the most crucial issues relating to residual functions is the need to ensure continued protection of victims and witnesses (and, in some instances,

⁹ *War Crimes Court Probes Death Report*, BBC News, Jun. 16, 2003, <http://news.bbc.co.uk/2/hi/africa/2992462.stm> (reporting on Koroma's suspected death); Tracey Gurd, The Open Society Justice Initiative, *Stephen Rapp, Special Court Chief Prosecutor Answers your Questions, Part II* (Sep. 2, 2009), <http://www.charlestaylortrial.org/2009/09/03/stephen-rapp-special-court-chief-prosecutor-answers-your-questions-part-ii/> (reporting that Koroma's death has not been definitively proven by the Office of the Prosecutor, so the indictment remains active).

¹⁰ Special Court for Sierra Leone Rules of Procedure and Evidence, Rule 11*bis*, <http://www.sc-sl.org/LinkClick.aspx?fileticket=YNjqn5TIYKs%3d&tabid=176> [hereinafter SCSL Rules of Procedure].

¹¹ SCSL Report, *supra* note 5, at 51.

¹² International Criminal Tribunal for Rwanda Rules of Procedure and Evidence, Rule 11*bis*, U.N. Doc. ITR/3/Rev.19 (2009), [hereinafter ICTR Rules of Procedure]; International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence, Rule 11*bis*, U.N. Doc. IT/32/Rev.44 (2009) [hereinafter ICTY Rules of Procedure]; SCSL Rules of Procedure, *supra* note 10, at Rule 11*bis* (noting that the SCSL Rules only provide for referral to "a State having jurisdiction and being willing and adequately prepared to accept such a case").

¹³ The Secretary-General Report, *supra* note 5, paras. 33-34 (international standards include, for example, the rights of the accused to a fair trial and safety from the imposition of the death penalty).

¹⁴ ICTR Letter, *supra* note 5, paras. 54, 59.

¹⁵ Letter from the President of the International Criminal Tribunal for Rwanda to the President of the Security Council (May 14, 2009), U.N. Doc. S/2009/247, paras. 29, 69.

¹⁶ The Secretary-General Report, *supra* note 5, para. 35.

their dependents) who have appeared before the ICTY, ICTR and SCSL.¹⁷ Many of these individuals put their lives, and the lives of their immediate family members, at risk by providing evidence to the time-limited tribunals. If there is an interruption or an arbitrary stoppage of this protection due to the closure of the tribunals, these witnesses and their families may again be at risk for harassment, injury or death. A failure to provide uninterrupted protection not only puts witnesses at risk and damages the credibility of the tribunals, it also endangers the work of other existing tribunals, such as the ICC, and any future time-limited tribunals.¹⁸ Witnesses will be less likely to assist the ICC or other tribunals if they have heard that witnesses were put at risk following the closure of the ICC's operations in a situation country or of the time-limited tribunals.

Currently, judges of the ICTY, ICTR and SCSL issue orders for the protection of victims or witnesses during the proceedings of a case, and these orders may be revisited as needed.¹⁹ This protection can range from non-disclosure to the public of identifying information about a victim, witness, or their relatives; expunging names and identifying information from the tribunals' public records; hearing witnesses in closed session; and assigning pseudonyms; to physical relocation of a witness and his or her family to another country (for example, insider witnesses).²⁰ These orders are implemented through the work of the Registry of each tribunal.²¹ There are more than 1,400 ICTY witnesses and 2,300 ICTR witnesses subject to protective orders.²² The Office of the Prosecutor may also carry out protective measures for the purpose of investigations and trials (such as for informants and their families).²³

Residual mechanisms for the ICTY, ICTR and SCSL will need to be able to carry out all of these judicial and administrative tasks after the closure of these tribunals. In doing so, the mechanism will, *inter alia*: (1) keep track of the victims and witnesses to inform them of relevant developments (such as the release

¹⁷ Int'l Ctr. for Transitional Justice & The Univ. of W. Ont. Faculty of Law, Report of the Residual Issues Expert Meeting on Planning for Residual Issues for International and Hybrid Criminal Tribunals (2007), para. 5, *available at* http://www.ictj.org/static/Prosecutions/ICTJ_ResidIssues_2010rp_Final.pdf [hereinafter Expert Meeting Report]; *see also* Cecile Aptel, Planning for Residual Issues and Mechanisms for International and Hybrid Criminal Tribunals: Briefing Paper 4 (2007).

¹⁸ Expert Meeting Report, *supra* note 17, para. 5; The Secretary-General Report, *supra* note 5, para. 29.

¹⁹ Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. SC Res. 827 U.N. Doc. S/Res/827 (1993), 32 I.L.M. 1159, 1184-85 [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, U.N. SC Res. 955, U.N. Doc. S/Res/955 (1994), 33 I.L.M. 1598, 1608, 1610 (1994) [hereinafter ICTR Statute]; SCSL Rules of Procedure, *supra* note 10, at Rule 75.

²⁰ The Secretary-General Report, *supra* note 5, paras. 26, 28 (stating that the ICTY has "concluded 13 agreements under which States accept in principle to consider the relocation of witnesses to their country").

²¹ Annex to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, art. 16(4), Jan. 16, 2002, 2178 U.N.T.S. 138 [hereinafter SCSL Statute]; The Secretary-General Report, *supra* note 5, para. 27.

²² The Secretary-General Report, *supra* note 5, para. 28 (as of May 2009— this number is likely to have increased in the interim).

²³ *Id.* para. 25.

of a convicted person);²⁴ (2) keep track of the observance and variation of the protective measures;²⁵ (3) address requests for assistance with respect to existing protective measures or new measures requested in a trial of a captured fugitive or other residual proceeding;²⁶ (4) serve as a contact point for states in which victims and witnesses have been relocated;²⁷ (5) monitor and assess threats to ensure that protective measures for specific witnesses remain effective, or have a third party do so, and revise protective orders as necessary;²⁸ and (6) review the necessity for continued relocation of witnesses and assist with their transfer to another state if relocation is no longer required.²⁹

After the physical closure of the ICTY, ICTR and SCSL, court orders must continue to be respected, including those related to the protection of victims and witnesses. Should a victim or witness be threatened, he or she must be able to rely on the residual mechanism for continued protection and investigation of the threat, and launch, if necessary, of proceedings for contempt. This is crucial to ensuring both the safety of victims and witnesses and the integrity of the tribunals' work. Under the Rules of Procedure and Evidence of the tribunals, each tribunal may hold in contempt anyone who knowingly and willfully interferes with the administration of justice.³⁰ The residual mechanisms must be provided with similar judicial powers.³¹ The victim and witness protection residual function, including the ability to hold contempt proceedings, will be required for many years and could last for the lifetime of any particular convicted person, victim, or witness.³²

C. Supervision of Enforcement of Sentences

Residual mechanisms will also be required to monitor and review the sentences of individuals convicted by the tribunals. The international and hybrid criminal tribunals do not have their own prisons and thus individuals convicted by these bodies must serve their sentences in the prisons of willing states. The

²⁴ Gabriël Oosthuizen, *Open Society Justice Initiative, The Residual Functions of the UN International Criminal Tribunals of the former Yugoslavia and Rwanda and the Special Court for Sierra Leone: The potential role of the International Criminal Court*, para. 27, (Sept. 30, 2008) (unpublished manuscript), <http://www.iclsfoundation.org/wpcontent/uploads/2009/05/iccpotentialresidualfunctionrole-briefing-paper-icls-to-osji-final-websitero2.doc>.

²⁵ The Secretary-General Report, *supra* note 5, para. 26 (The residual mechanisms may need to issue varying judicial protection orders if, for example, national immigration authorities request access to information because a protected person seeks asylum or immigration to that country).

²⁶ Oosthuizen, *supra* note 24, para. 27.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ ICTY Rules of Procedure, *supra* note 12, at Rule 77; ICTR Rules of Procedure, *supra* note 12, at Rule 77; SCSL Rules of Procedure, *supra* note 10, at Rule 77.

³¹ The Secretary-General Report, *supra* note 5, paras. 23-24. There have been many motions for contempt at the ICTY and ICTR and it can be expected that a residual mechanism would also face such motions.

³² Oosthuizen, *supra* note 24, para. 9 (such protection could, in certain circumstances, last beyond the lifetime of a convicted person (for example, if retaliatory threats stem from that person's family)).

The International Criminal Court

ICTY, ICTR and SCSL have entered into sentence enforcement agreements with a number of states.³³ The Statutes of the ICTY, ICTR and SCSL state that sentences of imprisonment are to be served in accordance with the applicable laws of the state in which the convicted person is imprisoned, subject to the supervision of the tribunals.³⁴ This means that if the convicted person is eligible for pardon, early release or commutation of sentence in the state of imprisonment, then the state must notify the tribunal. In the ICTY, ICTR and SCSL, the President consults with the judges and decides whether or not to grant pardon, early release or commutation of sentence, “on the basis of the interests of justice and the general principles of law.”³⁵ In making a decision, the President takes into account “the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly situated prisoners and the prisoner’s demonstrated rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor.”³⁶ A May 2009 report of the Secretary-General noted that, of 39 applications for early release submitted to date, the ICTY President granted 22, while the 6 applications submitted to date at the ICTR were all denied.³⁷ Thus, the residual mechanisms for these tribunals will need to be able to provide for such consultation and Presidential decision-making on an ongoing basis.

The residual mechanisms for the ICTY, ICTR and SCSL will also need to provide supervision of the prison conditions for all convicted persons, to ensure that they meet international standards. In many of the sentence enforcement agreements entered into with the States, the ICTY, ICTR and SCSL have entrusted the International Committee of the Red Cross with the task of conducting regular and unannounced visits to the prisons, and presenting confidential reports on their findings.³⁸ It is expected that similar arrangements will continue with the residual mechanisms of the tribunals. Other responsibilities under this residual function include: negotiating enforcement agreements with states (for example, with respect to the conviction of a captured fugitive); transferring convicted individuals to the state of enforcement or from one state of enforcement to another; making arrangements for the relocation of a prisoner once he or she has served the sentence; and, in the case of death while serving sentence, arranging to repatriate the body of the deceased person.³⁹

³³ The Secretary-General Report, *supra* note 5, para. 39 (referring to sentence enforcement agreements entered into with the ICTY and ICTR); SPECIAL COURT FOR SIERRA LEONE HOMEPAGE, <http://www.sc-sl.org/HOME/tabid/53/Default.aspx> (click on “Documents” tab and then scroll down to “Sentence Enforcement Agreements.” Referring to sentence enforcement agreements entered into by Finland, Rwanda, Sweden and the United Kingdom with the SCSL).

³⁴ ICTY Statute, *supra* note 19, art. 27; ICTR Statute, *supra* note 19, art. 26; SCSL Statute, *supra* note 21, art. 22.

³⁵ ICTY Statute, *supra* note 19, art. 28; ICTR Statute, *supra* note 19, art. 27; SCSL Statute, *supra* note 21, art. 23.

³⁶ The Secretary-General Report, *supra* note 5, para. 37.

³⁷ *Id.*

³⁸ *Id.* para. 39; Amended Agreement on the Enforcement of Sentences of the Special Court for Sierra Leone, Spec. Ct. of Sierra Leone-Rwanda, art. 6, Jan. 16, 2002, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=WNTKRbIUUNc%3d&tabid=176> (last visited Oct. 11, 2010).

³⁹ The Secretary-General Report, *supra* note 5, para. 38.

The International Criminal Court

This residual function will likely need to be exercised for many decades. For example, the ICTY has sentenced Milomir Stakić to 40 years,⁴⁰ the ICTR has sentenced Juvénal Kajelijeli to 45 years,⁴¹ and the SCSL has sentenced Issa Hassan Sesay to 52 years of imprisonment.⁴²

D. Management of Archives

The fourth residual issue is the preservation and protection of the archives of the ICTY, ICTR and SCSL. The tribunals hold and manage vast amounts of public and confidential records, evidence, data and other materials in paper, electronic, audio, video, physical and other formats. There are two main reasons why the archives must be carefully preserved and protected indefinitely. First, the archives will be required to conduct all of the other residual functions, such as trials of captured high-level fugitives, victim and witness protection and sentence enforcement monitoring.⁴³ Second, the archives will also be used, in the future, for research, for the preservation of memories and for education (including the prevention of historical revisionism).⁴⁴ The archives are not only a set of documents for the tribunals: they also constitute a historical record for Sierra Leoneans, Rwandans, and the people of the states of the former Yugoslavia.

The management of the tribunals' archives as a residual function is complex. The tribunals' records are both public and confidential. Confidential records include transcripts of closed trial sessions, documents containing identifying information and information provided to the Prosecutor on a confidential basis (which cannot be disclosed without the consent of the person or entity providing the initial information).⁴⁵ Over time, certain records may be declassified and made publicly available.⁴⁶ While confidential records must be kept separate from public records and under strict security conditions, the principle of archival integrity requires that public and confidential documents remain in the same location and not be transferred to separate locations.⁴⁷ Thus, the management of the archives following the closure of the time-limited tribunals must simultaneously preserve all relevant material – public and confidential – as well as protect the confidential material (and therefore, the protected victims and witnesses), and provide varying levels of access to officials of the residual mechanisms (including judges, Prose-

⁴⁰ Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, at 142 (Int'l Crim. Trib. for the Former Yugoslavia March 22, 2006).

⁴¹ Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-A, Judgment, at 119 (Int'l Crim. Trib. for Rwanda May 23, 2005).

⁴² Prosecutor v. Sesay, Case No. SCSL-04-15-A, Judgment, at 480 (Spec. Ct. for Sierra Leone Oct. 26, 2009).

⁴³ The Secretary-General Report, *supra* note 5, paras. 54-55.

⁴⁴ *Id.* para. 42.

⁴⁵ *Id.* para. 43.

⁴⁶ *Id.*

⁴⁷ *Id.* paras. 43, 195.

cutors, Registrars, respective staff members and defense counsel),⁴⁸ as well as other relevant individuals such as state officials pursuing domestic prosecutions, academic researchers, affected populations and others.⁴⁹ Of course, the residual mechanisms will generate more archives due to their work, especially if there are trials of high-level captured fugitives.⁵⁰

One contentious issue has been where to locate the archives of the tribunals. The dual nature of the archives – as working documents for officials of the residual mechanisms and as documents intended to preserve memories and promote education – creates difficulties if the work of the residual mechanism is in one jurisdiction and the affected population is in another. For example, if the SCSL residual mechanism is hosted by the Special Tribunal for Lebanon in the Netherlands,⁵¹ then it makes sense for the archives to be in the Netherlands in order for SCSL officials to access them. On the other hand, locating the archives in Europe could make it difficult for Sierra Leoneans to access the documents. One potential solution would be to have an information center with copies of relevant public documents in Sierra Leone.⁵²

While the need to preserve archives for tribunal residual functions will last until the death of the longest-serving convicted person or the longest-living protected victim or witness, the need to preserve records and materials for historical, research, policy, academic and other related purposes is virtually unending. The management of the ICTY, ICTR and SCSL archives could therefore prove to be one of the most difficult residual functions.

E. Other Residual Functions (Review of Judgments, Assistance to National Authorities)

The residual functions outlined above can be supplemented with other, less obvious but also important, residual functions. The Statutes of the ICTY, ICTR

⁴⁸ *Id.* para. 54 (noting that “[J]udges, Prosecutors, Registrars, respective staff members and defense counsel are the primary users of the Tribunal’s records and gain value from them).

⁴⁹ *Id.* para. 59 (“victims, witnesses and their families, the populations of the affected countries, [g]overnment officials, other international tribunals and courts, such as the International Criminal Court, journalists, historians, legal researchers, political scientists and persons interested in memorializing an event or creating educational materials” should all be provided access to the material).

⁵⁰ *Id.* para. 58.

⁵¹ The SCSL’s Charles Taylor Trial is currently being hosted by the Special Tribunal for Lebanon. See Special Tribunal for Lebanon, “Courtroom for Special Tribunal to Host Taylor Trial (May 17, 2010), <http://www.stl-tsl.org/sid/189> [hereinafter Special Tribunal] (The Special Tribunal for Lebanon has indicated openness to hosting the SCSL’s residual mechanism). See Giorgia Tortora, *The Special Tribunal for Lebanon and the Discussion on Residual Mechanisms*, 104 AM. SOC’Y INT’L L. PROC. (forthcoming 2010).

⁵² The idea of supplementing tribunal archives with regionally based information centers has been discussed within the Security Council’s Informal Working Group on International Tribunals, but the creation of such information centers is not considered by Council members to be a residual issue (rather, it is considered a legacy issue). See Anne Joyce, *The Role of States in the Closure of the International and Hybrid Criminal Tribunals*, in *Getting to Closure: Winding Up the International and Hybrid Criminal Tribunals*, 104 AM. SOC’Y INT’L L. PROC. (forthcoming 2010). The May 2009 Report of the Secretary-General discusses the creation of information centers, such as those that already exist in various districts in Rwanda (currently funded by the European Union, ICTR and Government of Rwanda). See The Secretary-General Report, *supra* note 5, paras. 235-37.

and SCSL provide that, where a new fact is discovered which was not known at the time of the trial or appeals proceedings, and which may have been a decisive factor in reaching the judgment, the convicted person or the Prosecutor may submit an application for review of the judgment.⁵³ For the Prosecutor, this right is limited to a period of 12 months after the delivery of the judgment.⁵⁴ For the convicted person, this right does not have a time limit. This open-ended right is linked to the possibility that evidence exonerating convicted individuals could be discovered (for example, in state archives) decades after conviction by the tribunal. The Tribunals consider the review of judgments to be an essential residual function, the unavailability of which would impinge on the rights of the convicted individuals.⁵⁵ This residual function must be available for the lifespan of the convicted individuals.

Another residual function is the provision of assistance to national and international authorities. The tribunals respond to requests for assistance from national authorities such as immigration departments and domestic prosecutors, and from United Nations agencies. The ICTY and ICTR consider this assistance to be essential “to maintain the ability of the national legal systems to prosecute those not subject to proceedings before the Tribunals.”⁵⁶ In order to assist the national authorities, a decision may be needed to vary a protective order for a protected witness.⁵⁷ This residual function will be required for at least the next three or four decades because domestic prosecutions or other domestic action (such as citizenship revocation) related to the conflicts in Rwanda, Sierra Leone and the former Yugoslavia may take place many years from now.⁵⁸

There are other potential residual functions that have been identified by commentators, such as: assistance in return of proceeds of crime,⁵⁹ compensation to victims,⁶⁰ preventing double jeopardy in future domestic proceedings,⁶¹ fulfillment of the continuing prosecutorial duty to disclose exculpatory material to the defense⁶² and continuing human resources obligations.⁶³ Like the functions described above, each of these functions could potentially be required for decades.

⁵³ ICTY Statute, *supra* note 19, art. 26; ICTY Rules of Procedure, *supra* note 12, at Rules 119-21; ICTR Statute, *supra* note 19, art. 25; ICTR Rules of Procedure, *supra* note 12, at Rules 120-23; SCSL Statute, *supra* note 21, art. 21(2); SCSL Rules of Procedure, *supra* note 10, at 120-22.

⁵⁴ ICTY Rules of Procedure, *supra* note 12, at Rule 119; ICTR Rules of Procedure, *supra* note 12, at Rule 120; SCSL Rules of Procedure, *supra* note 10, at Rule 120.

⁵⁵ The Secretary-General Report, *supra* note 5, para. 32.

⁵⁶ *Id.* para. 40.

⁵⁷ *Id.*

⁵⁸ Such a time delay is not unheard of. For example, Canada launched a domestic prosecution in 1987 against an individual alleged to have committed war crimes during World War II. *R. v. Finta*, [1994] 1 S.C.R. 701 (Can.).

⁵⁹ Oosthuizen, *supra* note 24, para. 46.

⁶⁰ *Id.*

⁶¹ Expert Meeting Report, *supra* note 17, para. 10.

⁶² Oosthuizen, *supra* note 24, para. 43.

⁶³ VALERIE OOSTERVELD & TRACEY GURD, SPECIAL COURT FOR SIERRA LEONE RESIDUAL ISSUES EXPERT GROUP MEETING, THE SPECIAL COURT FOR SIERRA LEONE: OPTIONS FOR ADDRESSING RESIDUAL FUNCTIONS AFTER PHYSICAL CLOSURE 6 (Feb. 21, 2008).

III. The International Criminal Court and Residual Issues

There are two ways in which residual issues of the time-limited international and hybrid criminal tribunals touch upon the ICC. First, the ICC is currently being considered as a possible host for one or more of the residual mechanisms created to implement ICTY, ICTR, or SCSL residual issues. Second, the ICC is going to face residual issues itself as it completes its work on specific cases and in specific countries; therefore, it may be able to learn from the experiences of the time-limited tribunals. Similarly, if residual issues are not adequately addressed for the time-limited tribunals, these failures could have a negative impact upon the ICC's work.

A. The ICC as a Possible Host of Residual Mechanisms

Turning to the first issue, the ICC is being discussed as a possible future host institution for the joint ICTY-ICTR or SCSL residual mechanism. Initially, some states that were considering the question of how to address the ICTY, ICTR and SCSL's residual issues, raised the possibility of simply incorporating them into the role and function of the ICC, such that the ICC would perform all of the residual functions in its own name.⁶⁴ One can understand why this idea would be quite attractive as a potential solution: the ICC is permanent; it has jurisdiction over the same general types of crimes as the time-limited tribunals (genocide, crimes against humanity and war crimes); and it contains experts who understand how to track fugitives, oversee sentence enforcement, protect witnesses and preserve and protect archives. However, almost immediately, it became apparent that the residual functions of the time-limited tribunals could not simply be folded into those of the ICC. The ICC is a treaty body created by the Rome Statute of the ICC.⁶⁵ In contrast, the ICTY and ICTR were established by the UN Security Council,⁶⁶ and the SCSL was created through an agreement between the UN Secretary-General and the Government of Sierra Leone.⁶⁷ Thus, each of the time-limited tribunals has a different legal mode of creation. There are also other legally important differences between the ICC and the time-limited tribunals. The ICC has different temporal and geographic jurisdiction than the time-limited tribunals;⁶⁸ some of the crimes are defined differently in the Rome Stat-

⁶⁴ See U.N. SCOR, 5697th mtg. at 16-17, U.N. Doc. S/PV.5697 (June 18, 2007) (Statement by Mr. Arias (Pan.)).

⁶⁵ The Rome Statute of the ICC required 60 ratifications in order to enter into force. See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, art. 126 (July 17, 1998) [hereinafter Rome Statute of the ICC], 37 I.L.M. 1002, 1068 (1998).

⁶⁶ See generally ICTY Statute, *supra* note 19 and ICTR Statute, *supra* note 19.

⁶⁷ See generally SCSL Statute, *supra* note 21.

⁶⁸ See Rome Statute of the ICC, *supra* note 65, art. 126 (The ICC's temporal jurisdiction began on July 1, 2002, whereas the jurisdiction of the ICTY began in 1991, the ICTR in 1994 and the SCSL in 1996); see also INTERNATIONAL CRIMINAL COURT, ABOUT THE COURT, <http://www2.icc-cpi.int/Menus/ICC/About+the+Court/> (last visited Oct. 15, 2010); ICTY Statute, *supra* note 19, art. 1; ICTR Statute, *supra* note 19, art. 1; SCSL Statute, *supra* note 21, art. 1; see also Rome Statute of the ICC, *supra* note 65, arts. 12-13 (The ICC's jurisdiction extends to States Parties, and to countries or situations referred by

The International Criminal Court

ute than in the time-limited tribunals;⁶⁹ some of the states with deep interests in the time-limited tribunals are not States Parties to the Rome Statute;⁷⁰ and the procedures used by each of the time-limited tribunals differ from those of the ICC.⁷¹ In order to address these crucial differences, the ICC's Rome Statute and other instruments would need to be amended.

The changes required for the ICC to perform residual ICTY, ICTR or SCSL residual functions in its own name would go beyond relatively straightforward amendments of "an exclusively institutional nature" permitted by article 122.⁷² Rather, amendments under article 121 – the general amendments provision – would be required. These amendments require consensus among the ICC States Parties or, failing that, approval by a two-thirds majority with entry-into-force occurring one year after instruments of ratification or acceptance have been deposited by seven-eighths of the States Parties.⁷³ If the crime provisions of the Rome Statute are amended, then there is a slightly different mode of entry-into-force.⁷⁴ Article 121 creates a high threshold for entry-into-force of substantive amendments. This complexity,⁷⁵ combined with the fact that there is unlikely to be any appetite in the near future among ICC States Parties to consider the kinds of amendments required to transfer ICTY, ICTR or SCSL residual issues to the jurisdiction of the ICC,⁷⁶ makes complete absorption by the ICC of residual func-

the UN Security Council. A non-State Party may also lodge a declaration accepting jurisdiction under art. 12(3)).

⁶⁹ ICTR Statute, *supra* note 19, art. 3; Rome Statute of the ICC, *supra* note 65, art. 7 (for example, the ICTR Statute requires an overarching element of discrimination on national, political, ethnic, racial or religious grounds in all crimes against humanity, while the Rome Statute does not).

⁷⁰ For example, the United States is a strong supporter of the ICTY, ICTR and SCSL, but is not a State Party to the Rome Statute of the ICC.

⁷¹ International Criminal Court, R. PROC. & EVID., paras. 121-26, available at http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf (The Rules of Procedure and Evidence of the ICTY, ICTR and SCSL differ slightly from each other, but differ significantly in many respects from the Rules of Procedure and Evidence of the ICC. For example, the ICC's Rules cover a procedure called a "confirmation of charges" hearing that is not a procedure used by any of the time-limited tribunals).

⁷² Rome Statute of the ICC, *supra* note 65, art. 122 (covering amendments to provisions of an institutional nature, which may be proposed at any time and which, if adopted, enters into force for all States Parties).

⁷³ *Id.* arts. 121(3), (4).

⁷⁴ *Id.* art. 121(5) (under the amendment procedure for the crime provisions, amendments enter into force only for those States parties which accept the amendment through deposit of instruments of ratification or acceptance. For those States Parties which do not accept the amendment, "the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.").

⁷⁵ INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, UNIVERSITY OF WESTERN ONTARIO FACULTY OF LAW, PERMANENT MISSION OF CANADA TO THE UNITED NATIONS, FINAL REPORT OF THE EXPERT GROUP MEETING ON "CLOSING THE INTERNATIONAL AND HYBRID CRIMINAL TRIBUNALS: MECHANISMS TO ADDRESS RESIDUAL ISSUES," (Mar. 24, 2010) [hereinafter Report on Closing the Int'l Tribunals], available at http://www.ictj.org/static/Prosecutions/ICTJ_ResidIssues_2010rp_Final.pdf.

⁷⁶ See Review Conference of the Rome Statute of the International Criminal Court, Kampala, Uganda, May 31-June 11, 2010, *Amendments to Article 8 of the Rome Statute*, RC/Res.5 (Jun. 16, 2010) and Review Conference of the Rome Statute of the International Criminal Court, Kampala, Uganda, May 31-June 11, 2010, *The Crime of Aggression*, RC/Res.6 (Jun. 28, 2010) (amendments were made to the Rome Statute to extend the war crimes provision to prohibit the use of certain weapons during non-

tions unrealistic. Similar complexities exist for options such as transferring only some of the residual issues to the ICC, outsourcing some residual functions to the ICC, or having ICC personnel double- or multi-hatting (performing functions both as ICC personnel and as ICTY, ICTR and/or SCSL personnel).⁷⁷

Attention has since shifted to whether the ICC's facilities could be used to perform some or all of the residual functions for the time-limited courts. For example, could the ICC's facilities be used to provide courtroom, detention or archiving space for the ICTY, ICTR or SCSL's residual mechanisms to perform their functions? This has been described as a feasible option for ICC involvement.⁷⁸ There is already precedent in place for this option – the SCSL used the ICC's facilities from mid-2006 until May 2010 for the trial of Charles Taylor.⁷⁹ Under the SCSL's agreement with the ICC, the SCSL reimbursed the ICC for its use of the ICC's facilities, services and support.⁸⁰ Thus, perhaps a similar approach could be used for the ICTY, ICTR or SCSL's residual mechanism. The ICC's Assembly of States Parties has indicated a willingness to consider this option. In November 2009, the ICC's Assembly adopted a resolution "[e]ncourag[ing] the Court to continue the dialogue with other international courts and tribunals to assist with their planning on residual issues and to report to the Assembly of States Parties on this dialogue."⁸¹ This issue was addressed, for example, at a February 2010 expert group meeting in New York on "Closing the International and Hybrid Criminal Tribunals: Mechanisms to Address Residual Issues".⁸² Furthermore, in March 2010, the President of the ICC met with the United Nations Under-Secretary-General for Legal Affairs, Patricia

international armed conflict and to adopt a definition and modalities for the exercise of jurisdiction over the crime of aggression.) There was some discussion that the next Review Conference would likely take place in seven years, by which all of the time-limited international and hybrid criminal tribunals would be closed.

⁷⁷ Oosthuizen, *supra* note 24, at 13-18.

⁷⁸ Coalition for the International Criminal Court, *Residual Functions and the ICC* 3, 9 (Aug. 30, 2007) [hereinafter CICC Non-paper] (categorized as a "non-paper" that was not published on the CICC website, on file with the Loyola University Chicago International Law Review).

⁷⁹ United Nations, *The situation in Sierra Leone*, U.N. SC Res. 1688, UN SCOR 61st sess., 5467th mtg., U.N. Doc. S/Res/1688 (2006) para. 3 (noting that the SCSL used the ICC facilities for the Taylor trial); *see also* International Criminal Court, *Memorandum of Understanding regarding Administrative Arrangements between the International Criminal Court and the Special Court for Sierra Leone*, ICC Doc. ICC-PRES/03-01-06, (April 13, 2006) [hereinafter SCSL-ICC Agreement], available at http://www.icc-cpi.int/NR/rdonlyres/66184EF8-E181-403A-85B8-3D07487D1FF1/140161/ICCPRES030106_en.pdf; *see also* Special Tribunal, *supra* note 51 (noting that the Taylor trial was moved to the facilities of the Special Tribunal for Lebanon when the ICC's trial docket became heavier than it had been in 2006).

⁸⁰ Oosthuizen, *supra* note 24, para. 65 (This reimbursement is quite detailed, as it includes all "clearly identifiable direct and indirect costs that the ICC may incur" including a component for any depreciation in the value of ICC equipment and property); SCSL-ICC Agreement, *supra* note 79, arts. 3, 5, 13.

⁸¹ International Criminal Court, Strengthening the International Criminal Court and the Assembly of States Parties, para. 3, ICC-ASP/8/Res.3 (2009).

⁸² Report on Closing the Int'l Tribunals, *supra* note 75, at 4 (Participants "noted that it would be helpful to determine earlier rather than later whether the ICC might play a role with respect to hosting one or more residual mechanisms, as the ICC's permanent premises are scheduled to be completed in 2014. The issue of joint administrative tasks and their space requirements ought to be considered and, ideally, communicated by the end of this year.").

O'Brien, to express "the Court's openness to discussing how it could support the residual mechanisms and archives of the closing ad hoc tribunals [–] the ICTY and ICTR."⁸³

While recognizing the benefits that could emerge from the ICC hosting some or all of the residual mechanisms for the time-limited tribunals, some commentators have indicated concern with such an idea. They are worried that the ICC may not have the capacity to both meet its own needs and provide assistance to other institutions: "the ICTY, ICTR, and SCSL's residual functions will likely be the most demanding in the first few years after they have completed their mandates, which[,] according to available estimations of completion strategies, will coincide with a period when the ICC is engaged in a high volume, and perhaps continuous, pattern of work."⁸⁴ Thus, they caution that, before the ICC agrees to host any residual mechanism for the ICTY, ICTR or SCSL, it must determine as accurately as possible what resources it can realistically offer to these institutions.⁸⁵ This is why, at a February 2010 expert group meeting, participants discussed the possibility that the ICC's permanent premises – which have not yet been constructed – be planned in such a way that they may accommodate hosting residual mechanisms.⁸⁶ This concern regarding the capacity of the ICC to host other institutions is echoed in the recent experience of the SCSL. Under the SCSL-ICC agreement, the ICC's own requirements take priority over those of the SCSL.⁸⁷ Thus, as the ICC became busier, the SCSL's Taylor trial had to reduce its use of one of the ICC's courtrooms.⁸⁸ As a result, the SCSL moved the Taylor trial to the facilities of the Special Tribunal for Lebanon in nearby Leidschendam.⁸⁹

Among other concerns, the ICC is located in The Hague, far from the former Yugoslavia, Rwanda, and Sierra Leone. If the ICC was used as a hub for the residual mechanisms of the ICTY, ICTR and SCSL, it may be difficult for those residual mechanisms to carry out their work in victim protection, sentence enforcement, and providing access to the affected populations to the archives.⁹⁰ Others reply that some functions could be performed in or near affected societies, perhaps via satellite or field offices.⁹¹ The current discussion within the Security

⁸³ International Criminal Court, *Weekly Update #28* at 3 (April 6, 2010), http://www.icc-cpi.int/NR/rdonlyres/66246BE8-CDDB-4895-80FF-F10B2CFF73ED/281720/ed28_eng1.pdf.

⁸⁴ CICC Non-paper, *supra* note 78, at 3.

⁸⁵ *Id.*

⁸⁶ Report on Closing the Int'l Tribunals, *supra* note 75, at 4.

⁸⁷ SCSL-ICC Agreement, *supra* note 79, arts. 2(2), 2(3).

⁸⁸ Prosecutor v. Taylor, Case No. SCSL-2003-01-T, Transcript, at 40486, lines 5-7 (May 3, 2010) (The time pressures on the SCSL's Taylor trial are evident in the transcript. For example, in the transcript of May 3, 2010, the Presiding Judge notes that the Taylor trial needed to adjourn for the day at 1:00 p.m. as the courtroom was needed for an ICC trial that afternoon).

⁸⁹ See Special Tribunal, *supra* note 51.

⁹⁰ Oosthuizen, *supra* note 24, para. 42(v).

⁹¹ *Id.*

The International Criminal Court

Council is to establish one residual mechanism for the ICTY and ICTR, with two branches, one in Europe (this one could be at the ICC) and one in Africa.⁹²

On the other hand, commentators also note that, by using ICC facilities for ICTY, ICTR and/or SCSL residual matters, there may be a reduction in operation cost.⁹³ These savings would stem from the fact that the residual mechanisms would not need to have, among other things, their own courtrooms (including attendant personnel such as interpreters and security), but could instead use the ICC's courtrooms. Similarly, if the residual mechanisms could use the ICC's detention facilities and archive space, this would also reduce the need for the residual mechanism to have and maintain such similar space. The main difficulty is that, at present, the ICC does not have extra courtroom and archive space.⁹⁴ The estimated construction completion date of the new ICC premises is 2014,⁹⁵ but unless additional space is planned for prior to construction, the same issues (at least with respect to courtrooms and archives) may arise even after the move. For example, the ICTY has estimated that, by the end of 2010, its physical records will require 3,704 shelf meters and electronic records will amount to 8,000 terabytes or more (which require specific server rooms).⁹⁶ The ICTR has estimated that, by the end of 2010, its paper records will require 2,336 shelf meters and digital storage requirements will amount to 1,020 terabytes (also requiring specific server rooms).⁹⁷ These requirements will clearly necessitate a great deal of additional physical and digital space.

B. The ICC's Residual Issues

The ICC will face residual issues even though it is a permanent international court as opposed to a time-limited court. The ICC will eventually complete its work in each of the current situation countries: Central African Republic, Democratic Republic of the Congo, Kenya, the Darfur region of Sudan and Uganda.⁹⁸ Following the completion of proceedings linked to those situation countries, the ICC will have continuing obligations to protect victims and witnesses, ensure enforcement of sentences and allow for access to archives to affected populations in order to prevent historical revisionism and to facilitate historical research. Similarly, it will be important for the ICC to protect and promote its legacy in the situation countries even after the ICC's field offices have closed their doors. Thus, as Boas and Oosthuizen point out, the ICC will need to plan for many 'post-case' residual issues.⁹⁹ The Committee on Budget and Finance of the ICC's Assembly of States Parties has recognized this, noting that "appropriate consider-

⁹² Chargé d'affaires, *supra* note 6, para. 12.

⁹³ Oosthuizen, *supra* note 24, para. 67; Expert Meeting Report, *supra* note 17, para. 19.

⁹⁴ Oosthuizen, *supra* note 24, para. 67; CICC Non-paper, *supra* note 78, at 3.

⁹⁵ *Permanent Premises*, ICC-ASP/6/Res.1 (2007) para.14.

⁹⁶ The Secretary-General Report, *supra* note 5, para. 51.

⁹⁷ *Id.*

⁹⁸ INTERNATIONAL CRIMINAL COURT, SITUATIONS AND CASES, <http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited Nov. 3, 2010).

⁹⁹ Boas and Oosthuizen discuss this issue in some detail, by asking these questions:

ation should be given to the role that the field offices are expected to play and how, at the conclusion of Court proceedings in a given area, any residual issues should be handled.”¹⁰⁰

IV. Conclusion: Lessons for the ICC from the Closure of the ICTY, ICTR and SCSL

Given that the residual mechanisms for the ICTY, ICTR and SCSL have not yet been established, and the role of the ICC in these mechanisms is still undecided, are there any lessons at this early stage that can assist the ICC? The answer to this question is undeniably “yes.” While the post-World War II International Military Tribunals in Nuremberg and Tokyo provide little guidance to the current-day tribunals about, for example, how to address victim and witness protection obligations, electronic archival needs or fugitive indictments,¹⁰¹ the work done to date on the post-closure options for the ICTY, ICTR and SCSL on these issues has been invaluable. The ICTY, ICTR and SCSL, along with the Security Council and others, have had to consider how to address the *sui generis* scenario of post-closure legal existence and operation. These institutions have not only clarified the residual issues that must be planned for by the Security Council, ICTY, ICTR and SCSL, they have identified issues that must also be consid-

After the completion of trials and appeals, should the Court keep in The Hague the originals of Registry-registered written evidence and other materials such as physical exhibits that may be used again in other cases or in post-case proceedings such as reviews? Would the public have physical access to the non-confidential archive in The Hague, and under what procedure, and would online web-based access be generally provided? Or should the Court retain copies of public materials with their originals being transferred to the relevant authorities in the situation country for archiving and public-memory-related purposes, for example? How and where would the Court store the originals or copies, as the case may be? Who would be authori[z]ed to declassify Registry-held confidential materials? To which national prosecuting authorities and other bodies may and should the OTP [Office of the Prosecutor] provide access to OTP-held confidential materials, and for what purpose and under which procedure? What would be the situation in relation to materials collected for preliminary investigations that did not result in Pre-Trial Chamber-authori[z]ed investigations? Who would be responsible for contacting victims and witnesses for whom protected measures were ordered – in some instances many years earlier – by judges about the possible lifting of those measures? What procedures would the Court have to follow in relation to reports that someone convicted or acquitted by it is being tried again for the same conduct at national level? How would the role of the Court change in relation to other legacy issues such as countering misinformation about completed cases and helping to ensure a positive and lasting impact on national healing, truth and justice efforts and justice-sector reform efforts?;

GIDEON BOAS & GABRIËL OOSTHUIZEN, INTERNATIONAL CRIMINAL LAW SERVICES, *Suggestions for Future Lessons-Learned Studies: The Experience of Other International and Hybrid Criminal Courts of Relevance to the International Criminal Court*, at 15 n.41, (2010), available at http://www.iccnw.org/documents/ICLS_REPORT_Lessonslearnedgapsstudy_FINAL.pdf.

¹⁰⁰ INTERNATIONAL CRIMINAL COURT ASSEMBLY OF STATES PARTIES, REPORT OF THE COMMITTEE ON BUDGET AND FINANCE ON THE WORK OF ITS TWELFTH SESSION (May 13, 2009), ICC-ASP/8/5, para. 73.

¹⁰¹ See Kevin Jon Heller, *Completion Strategies and the Office of the Prosecutor*, LEUVEN CENTRE FOR GLOBAL GOVERNANCE STUD. WORKING PAPERS, 7-9 (2009) (describing the relatively abrupt completion of the International Military Tribunal and the International Military Tribunal for the Far East); see also Guido Acquaviva, “Best Before the Date Indicated”: *Residual Mechanisms at the ICTY, The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, at 4-6, in *THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA*, (Göran Sluiter, Bert Swart & Alexander Zahar eds.) (forthcoming 2010) (outlining the residual mechanisms put into place for the Nuremberg Military Tribunals, which provide some interesting lessons learned on archival integrity).

The International Criminal Court

ered by the ICC in the future (even if the ICC will need to address residual issues in a somewhat different manner due to the permanent nature of the institution). Thus, the very fact that individuals and states have considered which obligations continue past the closure of the time-limited tribunals, will assist the ICC in identifying ways to provide for its own continuing obligations when a situation moves from being “live” to being “dormant.”

For example, consider the issue of fugitives. While the ICC is a permanent institution and therefore does not need to consider how to prosecute fugitives post-closure, the ICC does need to consider and make policy decisions about when it will scale down its investigatory and outreach presence in a situation country in response to a lack of international action on arrest warrants. These pressures were already evident in the ICC’s eighth session of the Assembly of States Parties in November 2009, in which there was some corridor discussion regarding whether the Uganda field office of the ICC might be scaled down due to lack of action on the arrests of Joseph Kony and other indicted individuals.¹⁰² If the ICC does scale down its presence in a situation country, it must also plan for future rapid scaling up of investigatory, defense and outreach presence if fugitives are captured and transferred to the ICC. The ideas arising from the discussions on how the joint ICTY and ICTR residual mechanism will scale up using a roster mechanism should be of assistance.¹⁰³

How will the ICC continue to protect victims and witnesses in situation countries after all of the trials are concluded, or in situation countries where lack of arrests have led to a scaling down of ICC activity and presence? This is the same difficulty presented to the ICTY, ICTR and SCSL residual mechanisms. For both the ICC and the time-limited tribunals, the answer will depend on whether funding is provided for an office in the relevant country. For example, many of the SCSL’s protected victims and witnesses are located in Sierra Leone. Therefore, there has been discussion that the SCSL’s residual mechanism will have an office or focal point person in Freetown, which would make ongoing victim and witness protection (and assessment of risks) in that country more straightforward than managing such protection from the Netherlands. The ICTY and ICTR joint residual mechanism, on the other hand, is not likely to be located in the former Yugoslavia or Rwanda.¹⁰⁴ If the ICC decides to close its field office, it will be in a similar position to that of the ICTY and ICTR, and will need to rely on regional coordination, perhaps from field offices in nearby countries. This issue becomes more difficult if there are no nearby offices.

¹⁰² This discussion was linked, in part, to: International Criminal Court, *Report of the Court on the Enhancement of the Registry’s Field Operations for 2010*, (Nov. 4, 2009), ICC-ASP/8/33 para. 11, which states: “It should be noted that the life span of a field office is dictated by the progress of the Court’s judicial proceedings in a given situation and/or case. . . . There are various development in a situation which may trigger a review of operations on the ground and, as a consequence, the scaling up or down of field offices, such as, for example . . . where arrest warrants have been issued but not implemented for a number of years.”

¹⁰³ See The Secretary-General Report, *supra* note 5, para. 258 for a discussion of the use of rosters.

¹⁰⁴ Chargé d’affaires, *supra* note 6, para. 12.

The International Criminal Court

A third lesson that the ICC can learn from discussions on how to address ICTY, ICTR and SCSL residual functions, is to adopt archiving policies from the beginning of each situation that take into account how the archives will be dealt with after a situation closure. For example, the ICTY and ICTR did not adopt common public/confidential security classification systems from the beginning of their existence. This has made preparing these tribunals' archives for closure more difficult. The Special Tribunal for Lebanon has learned from this experience and has employed an archivist to work on policies to keep track of the sources of Tribunal documents,¹⁰⁵ and ensure consistency in the way information is classified and processed within the different organs.¹⁰⁶ Similarly, while it can be assumed that the ICC will hold the archives of the situations and related cases at its headquarters in The Hague, the experience of the time-limited tribunals suggest that a decision should also be made early on as to where copies of public archival documents should be housed. This should avoid or lessen the kinds of debates that have taken place around the location of the ICTY and ICTR archives.¹⁰⁷

One final lesson that the ICC can extract from the discussions around the ICTY, ICTR and SCSL residual mechanisms has to do with funding. Unlike the time-limited tribunals, the ICC is funded through assessed contributions of its States Parties and its budget is decided each year by the States Parties. This relieves one major concern that the SCSL continually faces – where funds will come from to pay for its residual mechanism.¹⁰⁸ However, it does not relieve another potential concern: pressure from or decisions of the States Parties to eliminate field offices for budgetary reduction purposes once all of the cases in a situation have been dealt with, or in situations where there is lack of action on arrest warrants.¹⁰⁹ If such decisions are made, the ICC will need alternative via-

¹⁰⁵ The Special Tribunal for Lebanon's documents currently include not only Tribunal-generated documents, but also documents from the International Independent Investigation Commission and the Government of Lebanon.

¹⁰⁶ Special Tribunal, *supra* note 51.

¹⁰⁷ For example, Bosniak victim groups and some officials from Bosnia and Herzegovina (including the Mayor of Sarajevo) have requested that the ICTY's archives be located in Sarajevo or Srebrenica; however, representatives from Serbia and Croatia have strongly opposed placing the archives anywhere in the region, fearing for their security, accessibility of the materials and misuse of the materials for political purposes. See *Report of the President on the Conference Assessing the Legacy of the ICTY to the United Nations*, para. 7 (Apr. 27, 2010), available at http://www.icty.org/x/file/Press/Events/100427_legacyconference_pdt_report.pdf (last visited July 15, 2010).

¹⁰⁸ The SCSL is funded through voluntary contributions. It already has difficulty raising enough funds to cover its regular operations, despite the ongoing, high-profile trial of Charles Taylor. There is a concern that it will be much more difficult for the SCSL to secure voluntary contributions once it completes its work and transitions to a much lower-profile residual mechanism. We need a citation here stating the SCSL is having trouble raising funds despite the Charles Taylor trial. SPECIAL COURT FOR SIERRA LEONE, SEVENTH ANNUAL REPORT OF THE PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE: JUNE 2009-MAY 2010 36 (2010) ("Despite these greatly appreciated contributions [of almost \$15 million US], the Court faces a funding gap of \$11.1 million to close the Court."). "In spite of the significant budgetary reductions by the Court, the Court continues to experience serious difficulties in securing adequate funding to complete its mandate. This is due to the funding mechanism, which relies solely on the voluntary contributions of the international community." *Id.* at 40.

¹⁰⁹ The ICC will need to carry a budget line for addressing residual issues for completed situations and cases. The ICC will also need to consider how it will retain institutional knowledge of the situations

The International Criminal Court

ble plans for ongoing victim and witness protection and archival access for affected populations.¹¹⁰

In the future, it may be that all of these considerations will come together if the ICTY, ICTR, SCSL and Special Tribunal for Lebanon (and any similar future time-limited tribunals) are attached to the ICC as a common administrative hub.¹¹¹ In the meantime, the ICC should continue to be involved in, and kept apprised of, developments and decisions related to the creation of the ICTY, ICTR and SCSL residual mechanisms.

and cases after they are completed. See Eric Møse, *The ICTR's Completion Strategy – Challenges and Possible Solutions*, 6 J. INT'L CRIM. JUST. 667, 678 (2008) (voicing similar concern about loss of institutional knowledge post-ICTR closure).

¹¹⁰ This article is focused on residual functions, but a legacy issue also exists: the ICC needs to have a plan as to how it will continue to reach out to individuals and protect, promote and enhance its legacy absent field presence.

¹¹¹ The Secretary-General Report, *supra* note 5, para. 248 (“Rather than establish a series of stand-alone and potentially costly residual mechanisms, a longer term strategic view may suggest leaving the door open for them each to be attached to one common administrative hub at some point in the future. This might be . . . the International Criminal Court . . . as the only permanent international criminal court.”).